

**BEFORE THE  
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

**In The Matter Of:**

**SWEET EXPRESS, LLC  
USDOT# 1128178**

**Petitioner**

**Docket No.: FMCSA-2011-0160  
(Midwestern Service Center)**

**FINAL ORDER ON PETITION FOR REVIEW OF CONDITIONAL SAFETY RATING**

**I. Procedural History**

On April 28, 2011, Sweet Express, LLC (Petitioner) submitted a request for administrative review of a conditional safety rating pursuant to 49 CFR 385.15. The conditional safety rating was assigned following a compliance review of Petitioner on April 1, 2011 and was based solely on an alleged pattern of noncompliance with a critical regulation under rating factor 3 (operational).<sup>1</sup> The Safety Investigator (SI) found an alleged pattern of noncompliance with 49 CFR 395.8(i), failing to require drivers to forward records of duty status within 13 days, based on 63 alleged violations out of 433 records checked, which exceeded the 10% threshold. As a result, Petitioner was rated unsatisfactory for this factor and, under the rating table in Appendix B to Part 385, received an overall conditional rating.

In its request for administrative review of the conditional rating, Petitioner argued that nearly half of the violations of 49 CFR 395.8(i) pertained to a driver, Nazir Bouali, who no longer worked for the Petitioner in December 2010, the time period during which the records of

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<sup>1</sup> Not all violations of the Federal Motor Carrier Safety Regulations (FMCSRs) and Hazardous Materials Regulations (HMRs) are used in the calculation of a safety rating. Only acute violations and patterns of non-compliance with critical regulations affect the safety rating calculation. Acute and critical regulations are identified in 49 CFR, Part 385, Appendix B.VII. A pattern of non-compliance is defined as violations of a critical regulation in at least 10 percent of the records examined. *See* 49 CFR, Part 385, Appendix B.II.

duty status for that driver were allegedly missing. The Petition stated that Mr. Bouali last drove for the Petitioner on October 13, 2010, and attached a vehicle inspection report reflecting that Mr. Bouali was inspected while driving for Petitioner on that date.<sup>2</sup> Petitioner submitted affidavits from both Mr. Bouali<sup>3</sup> and its compliance officer<sup>4</sup> stating that Mr. Bouali was not driving a commercial motor vehicle under the carrier's authority during December 2010, and that Mr. Bouali's contract with Petitioner ended on December 1, 2010.

On July 12, 2011, I issued an order directing the Field Administrator for FMCSA's Midwestern Service Center to respond to Petitioner's argument within 30 days. On August 12, 2011, the Field Administrator submitted his response, which included a declaration by SI Matthew Kinnucan, who stated that he asked for records of duty status for November 2010, not December 2010.<sup>5</sup> SI Kinnucan asserted that he requested Mr. Bouali's November 2010 logs because a roadside inspection report from November 18, 2010 listed Mr. Bouali as a driver of a vehicle with a license plate registered to the Petitioner.<sup>6</sup> The Field Administrator also submitted the transcript of an e-mail conversation between SI Kinnucan and Petitioner's safety consultant, confirming that Petitioner told SI Kinnucan that Mr. Bouali was terminated in July 2010.<sup>7</sup> In his declaration, SI Kinnucan confirmed that 30 of the 63 alleged § 395.8(i) violations included missing logs from Mr. Bouali in November 2010.<sup>8</sup>

On August 26, 2011, Petitioner replied to the Field Administrator's Response, arguing that, even if SI Kinnucan requested November 2010 logs for Mr. Bouali, the violations were

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<sup>2</sup> See Petition for Administrative Review, Exhibit 2.

<sup>3</sup> See Petition for Administrative Review, Exhibit 3.

<sup>4</sup> *Id.*

<sup>5</sup> See Field Administrator's Response to the Assistant Administrator's July 12, 2011 Order, Exhibit A, Kinnucan Decl. at ¶ 4.

<sup>6</sup> *Id.* at Exhibit A, Kinnucan Decl. at ¶ 5 and Exhibit A-2.

<sup>7</sup> *Id.* at Exhibit A, Kinnucan Decl. at ¶ 4 and Exhibit A-1.

<sup>8</sup> *Id.* at Exhibit A, Kinnucan Decl. at ¶ 6.

found in error because Mr. Bouali did not drive under Petitioner's authority during November or December 2010. Petitioner submitted a letter from its payroll service provider stating that Mr. Bouali was not listed as an active employee, nor was he issued a paycheck during November or December 2010.<sup>9</sup> Petitioner also submitted a declaration from Kemal Hamulic, its compliance officer.<sup>10</sup> Mr. Hamulic's declaration explained that Mr. Bouali drove for Sweet Express as an owner-operator prior to – but not during – November 2010.<sup>11</sup> Mr. Hamulic admitted that Petitioner purchased the license plate on the vehicle subject to the November 18, 2010 inspection. But Mr. Hamulic claimed that Mr. Bouali reimbursed Petitioner for the license plate in order to drive as an owner-operator under his own authority.<sup>12</sup> Because the November 18, 2010 inspection did not result in any violations, Petitioner did not immediately notice the error and alleged that it subsequently challenged the inspection report.<sup>13</sup> The Field Administrator did not respond to Petitioner's reply.

## II. Discussion

FMCSA's safety fitness rating methodology (SFRM) is contained in Appendix B to 49 CFR, part 385. The SFRM evaluates six factors to determine a motor carrier's overall safety rating.<sup>14</sup> The individual rating for factors one through five are determined based on whether acute violations or patterns of non-compliance with critical regulations of the Federal Motor

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<sup>9</sup> See Petitioner's Reply to Field Administrator's Response, Exhibit 2.

<sup>10</sup> *Id.* at Exhibit 1.

<sup>11</sup> *Id.* at ¶ 5.

<sup>12</sup> *Id.* at ¶ 6.

<sup>13</sup> *Id.* at ¶ 7.

<sup>14</sup> The six factors are identified as: Factor 1 – General, Factor 2 – Driver, Factor 3 – Operational, Factor 4 – Vehicle, Factor 5 –Hazardous Materials, and Factor 6 – Accident Rate. With the exception of Factor 6, each of the Factors is measured by reference to corresponding regulatory parts. Factor 5 also may include the motor carrier's roadside out-of-service rate as part of the evaluation. Factor 6 is measured by a motor carrier's recordable accident rate.

Carrier Safety Regulations (FMCSRs) and Hazardous Materials Regulations (HMRs) are discovered during the investigation.<sup>15</sup>

For each violation of an acute regulation or pattern of non-compliance with a critical regulation, one point is assessed in the corresponding factor. However, two points are assessed for each pattern of non-compliance with a critical regulation of 49 CFR part 395.<sup>16</sup> If more than one point has been assigned in a factor, the factor is rated unsatisfactory.

As discussed above, 49 CFR 395.8(i) is defined as a critical regulation.<sup>17</sup> The CR report identified 63 missing records of duty status out of 433 records requested to check compliance with § 395.8(i) – a rate of missing logs exceeding 10%. Because the violation rate exceeded 10%, the violations of § 395.8(i) met the definition of a pattern of non-compliance. The pattern of non-compliance with § 395.8(i) resulted in an unsatisfactory rating in Factor 3, and, therefore, Petitioner's overall rating was conditional.<sup>18</sup>

### **III. Decision**

The purpose of an administrative appeal under 49 CFR 385.15 is to determine whether FMCSA committed error in assigning a safety rating. Under § 385.15(b), the motor carrier's request must explain the error it believes FMCSA committed in assigning the rating and provide information or documents in support of its argument.

Petitioner attempted to challenge the validity of the evidence that the Field Administrator submitted to support 30 violations of § 395.8(i). If those 30 violations were found in error, there would be only 33 violations found out of 433 records checked. Factor 3 would no longer meet

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<sup>15</sup> See Footnote 1.

<sup>16</sup> See 49 CFR part 385, App. B., II.(h).

<sup>17</sup> See 49 CFR part 385, App. B., VII.

<sup>18</sup> If Petitioner's factor 3 rating were satisfactory, Petitioner's overall rating would be satisfactory. See 49 CFR Part 385, App. B. III.

the threshold for a pattern of non-compliance with a critical regulation and Petitioner's safety rating would be upgraded to satisfactory.

Petitioner and the Field Administrator presented- evidence regarding Mr. Bouali's employment as a driver under Petitioner's authority and which logs SI Kinnucan requested during the compliance review. An inspection report indicates that Mr. Bouali drove for Petitioner on October 13, 2010.<sup>19</sup> In Mr. Bouali's April 2011 affidavit, he stated that his contract with Petitioner ended on December 1, 2010.<sup>20</sup> The Field Administrator presented evidence that that the SI requested November 2010 logs for Mr. Bouali<sup>21</sup> and that Mr. Bouali drove for Petitioner during November 2010 – in the form of a roadside inspection from November 18, 2010. Petitioner's reply continued to insist that the SI requested December logs, stated that Mr. Bouali did not drive for Petitioner during November 2010, and provided a letter from its payroll services provider corroborating this claim.<sup>22</sup> However, in the same reply, Petitioner provided statements regarding Mr. Bouali's employment that were inconsistent with its April 2011 Petition. Petitioner stated that Mr. Bouali did not drive under Petitioner's authority during November *or* December 2010, while the original Petition stated that Mr. Bouali's contract with Petitioner ended on December 1, 2010. It is at least possible under the contract terms attested to in a declaration supporting the Petition, therefore, that Mr. Bouali drove a commercial motor vehicle under Petitioner's authority during November 2010 – although the fact that Petitioner's payroll service provider's records do not show Mr. Bouali being paid during November or December 2010 makes that less likely. In an attempt to explain how the November 18, 2010 inspection was attributed to Petitioner, Petitioner's compliance officer attested that it purchased a

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<sup>19</sup> See Petition for Administrative Review, Exhibit 2.

<sup>20</sup> See Petition for Administrative Review, Exhibit 3

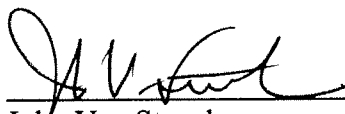
<sup>21</sup> See Field Administrator's Response, Exhibit A, Kinnucan Decl. at ¶ 4 and Exhibit A-1.

<sup>22</sup> See Petitioner's Reply to Field Administrator's Response, Exhibit 2.

license plate for Mr. Bouali, and later sold that license plate to Mr. Bouali. Petitioner did not provide any documentary evidence of this transaction.

Although Petitioner provided inconsistent statements regarding Mr. Bouali's employment, it did provide evidence indicating that Mr. Bouali was not driving under its authority in November or December 2010. Although SI Kinnucan declared that the 63 alleged violations of § 395.8(i) included 30 days of missing logs for Mr. Bouali in November of 2010, he did not provide any basis for the 30-day figure. The Field Administrator provided, at best, evidence of one instance of Mr. Bouali driving under Petitioner's authority during November 2010. The Field Administrator did not submit further documentation of trips made by Mr. Bouali for Petitioner in November 2010 (e.g., bills of lading or trip reports). Therefore, I find that Petitioner provided sufficient evidence, which the Field Administrator did not rebut given the opportunity to do so, that 29 violations of 49 CFR 395.8(i) found during the compliance review and causing the critical violation in factor 3, did not occur. Therefore, there were only 34 violations out of 433 checked, which does not yield a pattern of non-compliance with a critical violation.

Therefore, it is ORDERED that Petitioner's Petition for Review is granted, and its safety rating is upgraded to satisfactory.



John Van Steenburg  
Assistant Administrator  
Federal Motor Carrier Safety Administration

5/14/12  
Date

**CERTIFICATE OF SERVICE**

This is to certify that on this 15 day of May, 2012, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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